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No. 86-6139

In the Supreme Court of the United States

OCTOBER TERM, 1986

CLARA WATSON,
Petitioner,

vs.

FORT WORTH BANK & TRUST,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Amicus Landmark Legal Foundation* is a not-for-profit public interest law foundation committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the United States Constitution and individual rights. The Foundation, through original action litigation and amicus curiae briefs, has supported the rights of individual and corporate employers and individual employees to freely contract and interact in such a way as to promote the principle of free enterprise. Moreover, during the October, 1986 term, the Foundation filed with the Court

*Landmark Legal Foundation recently changed its name from Gulf and Great Plains Legal Foundation.

a Petition for Writ of Certiorari in the case of *The Rath Packing Company Creditors' Trust, etc. v. Equal Employment Opportunity Commission*, No. 86-67. Although the Court denied this petition, several of the issues presented therein survive in the case *sub judice*.

Landmark, as Gulf and Great Plains, has appeared as amicus curiae before this Court in a number of cases involving a broad range of public interest issues. Landmark submits this brief to assist the Court in its deliberations on the significant personal and economic liberty questions presented by this case.

SUMMARY OF ARGUMENT

This Court has developed two basic models of analysis to be applied in employment discrimination lawsuits brought under Title VII: the "disparate treatment" analysis and the "disparate impact" analysis. The former generally has been applicable to situations where the employer utilizes some subjective criteria in hiring or promotion decisions and the latter applicable to situations where the employer utilizes some objective, facially neutral criteria in deciding who to hire or promote.

Since its decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court has uniformly applied the disparate treatment analysis to subjective employment practices like those utilized by Fort Worth Bank & Trust in this case. If the Court were to hold for Petitioner in the present case, and apply the disparate impact analysis to the bank's subjective hiring practices, it would represent a bold and unwarranted deviation from sixteen years of precedent.

The disparate impact analysis of *Griggs*, from a practical standpoint, is simply not appropriate for subjective employment practices. It focuses on the *effect* of some employment practice. Disparate treatment, however, focuses on the *intent* of the employer when hiring or promoting rather than more generalized results of employment practices. In short, disparate impact is concerned with some adverse effect of employment practices on a particular group of applicants while disparate treatment looks for discriminatory animus on the part of the employer.

While private employers should not be permitted to base hiring or promotion decisions on race or sex alone, they should be given some discretion in deciding who to employ. If the *Griggs* disparate impact analysis is applied to subjective employment decisions, then employers will lose a great deal of this necessary discretion. Title VII plaintiffs can and will bring suit successfully without showing any discriminatory intent on the part of the employer. Meanwhile, the employer will feel inclined to hire a certain number of employees based primarily on their race or sex to avoid any appearance of using employment practices which adversely affect certain groups. As a result, the employer would have less discretion in hiring or promoting employees based upon sound business judgment relating to quality, productivity and so forth.

ARGUMENT

I.

THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY REJECTED APPLICATION OF THE DISPARATE IMPACT ANALYSIS TO AN EMPLOYER'S PURELY SUBJECTIVE EMPLOYMENT PRACTICES.

The disparate impact doctrine of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is not applicable to subjective employment practices. In light of Supreme Court precedent, such an application cannot withstand sound legal reasoning. Furthermore, public policy interests are best served if the disparate impact analysis is not stretched to fit subjective hiring and promotion criteria.

A. The Supreme Court Has Consistently Applied The Disparate Treatment Analysis, Rather Than The Disparate Impact Analysis, To Subjective Employment Practices.

The Court has made several rulings concerning the disparate treatment and disparate impact doctrines. These rulings have uniformly applied the disparate treatment analysis to subjective employment practices and the disparate impact analysis to facially neutral, objective employment practices. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the employer did not rehire a black man because he had intentionally violated the law to disrupt company operations. Since there was no objective, standardized hiring criteria at issue, but rather the subjective decision of an employer, the Court applied the disparate treatment analysis and looked for evidence that

the decision not to rehire was pretextual or for some indication of discriminatory intent. Similar reasoning was used in *Teamsters v. U.S.*, 431 U.S. 324 (1977). There, the defendant labor union was charged with facially discriminatory hiring and promotion practices at its Nashville terminal. The Court applied the disparate treatment theory and found the union guilty of systematic and purposeful employment discrimination.

The Court again analyzed subjective hiring practices according to *McDonnell Douglas* in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). The Court noted that under Title VII an employer is prohibited "from having as a goal a work force selected by any proscribed discrimination practice." *Furnco Construction*, 438 U.S. at 577. This language indicates that the Court was looking for evidence of discriminatory intent. In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the disparate treatment theory was again applied to the employer's subjective, discretionary hiring practices. The Court followed the *McDonnell Douglas* analysis very closely and noted that a hiring decision may not be "based upon unlawful criteria" which reveals some discriminatory animus. It is clear that where the challenged employment decisions are based upon some subjective, discretionary criteria the proper burden is proof of disparate treatment, which requires some showing of discriminatory intent.

The disparate impact analysis, on the other hand, has consistently been followed in cases involving hiring or promotion practices which are based on some objective, facially neutral criteria which is applied to all applicants regardless of race or sex. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the employer required a high school diploma and a passing score on certain standardized intelligence tests. The Court applied the disparate impact

analysis and looked to see if the objective criteria were related to successful job performance. It held that under Title VII employment or promotion decisions may not be based on testing or measuring procedures alone unless the procedures are demonstrated to be a reasonable measure of job performance. The Court stated that if "an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. Under *Griggs*, a showing of discriminatory intent is not required since the challenged practices are objective and facially neutral.

The primary concern in disparate impact cases is whether the employer can show a correlation between the objective criteria and job performance or some clear business necessity. *See Connecticut v. Teal*, 457 U.S. 440 (1982). In *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court applied the *Griggs* disparate impact analysis. At issue were two standardized exams which the paper company utilized in order to determine which employees were to be promoted. The plaintiffs were successful because the company failed to show that the exam scores of employees were related to the quality of their job performances. In *Washington v. Davis*, 426 U.S. 229 (1976), the District of Columbia police department required all applicants to take a standardized written exam. The test was racially neutral on its face but a higher percentage of blacks than whites failed the exam. The Court based its decision on the Fifth and Fourteenth Amendments, but also noted that even under a Title VII disparate impact theory the defendant would prevail since the written exams were sufficiently related to job performance. *Id.* at 249 (citing *Griggs* and *Albemarle Paper Co.*). It is only in the instances where facially neutral, objective employment practices are challenged that the Court has applied the disparate impact theory.

B. From A Practical Standpoint, The Disparate Impact Model Cannot Be Appropriately Applied To Subjective Employment Practices.

The disparate impact analysis looks to the effects of employment practices on certain protected groups. Disparate treatment, however, focuses on the intent of the employer. Disparate impact requires that the employer show some connection between the objective criteria and job performance. Hence, the impact theory is inapplicable where subjective employment criteria are utilized because no neutral, objective employment requirement is present which the employer can show is connected to to job performance. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* 1289 (2d ed. 1983). Because each form of analysis has a very different focus, the two can only be applied under the proper circumstances. As one commentator has noted:

> While disparate impact analysis is well suited to cases in which neutral, objective tests are challenged because the discriminatory effects of such tests can be measured without reference to intent, it is ill suited to cases in which subjective evaluations are made because the discriminatory effects of these evaluations ultimately must be measured by inquiring into intent, which inquiry is properly done under disparate treatment analysis.

Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 Cardozo L. Rev. 549, 552 (1986). Impact theory and treatment theory are each tailored to be applied to very different types of employment practices. It would be futile to apply either theory to a factual situation where it was not designed to be applied.

These competing theories require different methods of proof. Under disparate impact, the employer must show some business necessity for the challenged practice. Under disparate treatment, the employer need only show some legitimate, nondiscriminatory reason for the challenged hiring decision. Applying disparate impact to an employer's subjective hiring or promotion decisions would put that employer in the untenable position of having to show that an individual was hired or not hired due to a business necessity. This simply is an illogical and unfair burden of proof to force upon the employer.

C. Application Of The Disparate Impact Analysis To The Subjective Employment Practices Of Private Employers Would Effectively Strip Those Employers Of Necessary Discretion In The Selection And Promotion Of Employees.

Private employers, including those owning small businesses, are entitled to broad discretion in choosing who to hire or promote. This freedom, which is intended to encourage creativity, productivity, quality and competition, is a hallmark of the American free enterprise system. It is not the right of private employers to discriminate in their hiring or promotion decisions on the basis of race or sex. However, in the quest to preserve equal employment opportunity, the ownership rights of small business owners and other private employers must not be slighted. If the disparate impact analysis is applied to subjective employment decisions of employers, these rights will be slighted in that much of the necessary discretion in choosing who to hire or promote will be taken away.

The pertinent section of Title VII provides that it is unlawful for an employer "to fail or refuse to hire or

to discharge any individual . . . because of such individual's race, color, religion, sex or national origin," and it is also unlawful "to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities." 42 U.S.C. §2000e-2(a). The phrase "deprive or tend to deprive" indicates that Congress was mindful of employment practices which might result in an unfair disparate impact upon certain groups. Federal regulations require that employment selection procedures which have an "adverse impact" on protected groups of employees or applicants be "validated." 29 C.F.R. §1607.3 (1986). It is apparent that Congress has recognized the possibility of injustice under the guise of objective hiring or promotion criteria and this Court has fashioned the disparate impact theory to ensure that objective criteria are not utilized to unjustly discriminate.

Small business owners hire and promote individuals based on their perception of who will most benefit the business. If no neutral, objective criteria are used by the owner, then the decisions are purely subjective, based on the personal feelings of the owner-employer. In deciding which employees or applicants will be most productive, the employer may consider various characteristics of each individual, some of which may be intangible and difficult or impossible to qualify. Yet, if the disparate impact analysis is applied to these subjective decisions, the employer will be forced to do the impossible—qualify and explain employment decisions which were based on unqualifiable business acumen and instincts. Since it would be impossible for the owner-employer to meet the "business necessity" requirement of the disparate impact theory, he could be successfully sued for doing little more

than exercising personal discretion in running his own business. Consequently, employers would feel compelled to curtail the exercise of their hiring and promotion discretion for fear of liability to potential Title VII plaintiffs. Small business owners should not be chilled or discouraged from enjoying their freedom to hire employees who, in the opinion of the employer, will most benefit the business. The hiring and promotion discretion of small business owners and other private employers must be preserved. In our fervor to ensure equal opportunity of employment, a fervor which is certainly well-placed, we should not trample upon the rights of small business owners to run their businesses to the best of their ability.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be affirmed to the extent it rejects application of the disparate impact analysis to an employer's subjective employment practices.

Respectfully submitted,

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